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No. 94-4

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

MEREDITH FREEDMAN
and THOMAS HENNESSY, et al.,

*Petitioners,*

vs.

BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, et al.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioners, the parents of two individuals who were high school seniors in 1992, have standing to assert violations of the individuals' constitutional rights.

2. Whether the underlying controversy is moot and therefore not appropriately before the United States Supreme Court since the involved individuals, who are not parties to this case, have graduated from high school and can no longer participate in their graduation exercises.

3. Whether there are any special and important reasons which would provide a basis of review by the United States Supreme Court when petitioners, the parents of high school seniors who admitted consuming alcohol while traveling to a school prom, have asserted that constitutional violations occurred when the students were prohibited from participating in their graduation exercises.

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## JURISDICTION

The order of the Superior Court of New Jersey, Appellate Division, granting respondents' motion for summary disposition was issued on November 22, 1993. PA2a-5a.[1] The order of the Supreme Court of New Jersey denying certification in this matter is dated February 22, 1994. PA-1a. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

## STATEMENT OF THE CASE

Petitioners are the parents of two individuals, R.F. and L.H., who admitted to consuming alcohol while traveling to their prom on June 5, 1992. When R.F. and L.H. arrived at the prom, an odor of alcohol was detected by the principal. Consequently, R.F. and L.H. were precluded from attending the prom in accordance with the prom/snowball regulations.

Subsequent to the prom, the principal notified R.F. and L.H. that in accordance with school board policy number 5131.6 and the prom/snowball regulations, they would be prohibited from attending all of the year-end school sponsored activities. This included the baccalaureate ceremony, the senior breakfast and graduation exercises. Significantly, R.F. and L.H. were not suspended, expelled or denied their diplomas. The disciplinary action was affirmed by the superintendent of schools.

On June 15, 1992, the petitioners were granted a hearing before the board of education. They were represented by counsel. After the hearing, the board of education affirmed the decision to preclude the students from attending the above year-end school sponsored activities. To limit the negative effect the disciplinary action might have if known by third parties, the board also decided that the students' pupil records would not contain any references to the incident or the discipline imposed.

Park Ridge board policy 5131.6 entitled "Substance Abuse" defines "substance abuse" as consumption or use of any substance

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[1] "PA" denotes Petitioners' Appendix.

for purposes other than for the treatment of sickness or injury. The term "substance" includes alcoholic beverages. The policy prohibits the use of illegal substances by students at all times in all school buildings, on school property and at any activity sponsored by and under the supervision of school officials.

Pursuant to authority delegated by the board policy, the superintendent of schools in Park Ridge developed prom/snowball regulations which contain rules specifically addressing the consumption of alcohol/drugs in conjunction with the prom. These regulations direct students not to attend or host pre-prom parties where alcohol/drugs are served. The regulations state that school officials have the right to inspect limousines which drive students to the prom. They provide further that students may not bring alcohol/drugs to the prom site and that alcohol may not be served to any student or guest who attends the prom. Finally, the regulations state that the school must and will implement action against those who attempt to attend the prom in an unsatisfactory condition and/or are found to be in possession of alcohol and/or drugs. Specifically, the regulations state that the penalty for members of the senior class will be restriction from participating in all end of year school sponsored activities, including graduation exercises. PA-29a.

The prom regulations were sent to all students attending the prom, including R.F. and L.H., to be read over with their parents. After reading the regulations, parents and students were asked to sign a prom information sheet indicating that they intended to comply with the regulations. R.F., L.H. and their parents each signed such acknowledgements. To avoid any possibility of misinterpretation, the principal verbally reviewed the regulations with all of the students attending the prom. It is the above documents upon which the respondents relied in imposing discipline on R.F. and L.H.

A state administrative law judge below denied the petitioners' motion for emergent relief, finding that petitioners could not meet their burden of showing a likelihood of success on the merits. PA-23a. That decision was affirmed by the New Jersey

Commissioner of Education. PA-21a. Graduation exercises proceeded without R.F. and L.H. on June 18, 1992.

Petitioners appealed the emergent relief determination to the New Jersey State Board of Education. Respondents filed a motion to dismiss with the State Board which was granted. RA-1.[2]

The underlying petition was scheduled for plenary hearing before another state administrative law judge. Respondents filed a motion for summary decision. The administrative law judge granted the motion for summary decision, finding that the respondents had, pursuant to their authority, adopted a policy and regulations which prohibited the conduct engaged in by R.F. and L.H. PA-12a. The administrative law judge found further that the matter was moot because there was no relief that could be granted. The decision was affirmed by the New Jersey Commissioner of Education and the State Board of Education. PA-8a and 6a.

Petitioners appealed to the Superior Court of New Jersey, Appellate Division. Both petitioners and respondents filed a motion for summary disposition. Petitioners' motion was denied and respondents' motion was granted. PA-2a and 4a.

Petitioners filed a Notice of Petition for Certification with the Supreme Court of New Jersey. The New Jersey Supreme Court denied certification on February 22, 1994. PA-1a.

A petition for writ of certiorari was filed in this matter by letter dated May 17, 1994. The Petition was returned to petitioners on June 7, 1994 by the Clerk for failure to comply with the Rules of Procedure. RA-2. The corrected petitions were filed by letter dated June 27, 1994. RA-3. Whereas, the caption on the original Petition listed the petitioners as "R.F. and L.H." and their parents, the corrected Petition contained a revised caption which deleted R.F. and L.H. as petitioners. Counsel for respondents never received the corrected Petition and only learned that the corrected Petition had been re-filed on July 7, 1994. RA-4. Therefore, respondents' brief in opposition is due on August 8, 1994.

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[2] "RA" denotes Respondents' Appendix.

## ARGUMENT

### POINT I

### THIS PETITION IS NOT PROPERLY BEFORE THIS COURT SINCE THE PETITIONERS HAVE NO STANDING AND SINCE THE CASE IS MOOT.

#### A. Petitioners Have No Standing

Originally, the petitioners in this matter were R.F., L.H., Meredith Freedman, the mother of R.F. and Thomas Hennessy, the father of L.H. The Petition was signed by Meredith Freedman and Thomas Hennessy. After the original Petition was filed, the Clerk's office informed the petitioners' parents that, since they were proceeding pro se, they could each represent themselves, but they could not represent anybody else. The Petition was returned because Meredith Freedman and Thomas Hennessy were attempting to represent their children R.F. and L.H. Subsequently, petitioners changed the caption on the Petition so that it no longer included R.F. and L.H. as parties. Apparently, R.F. and L.H. decided not to take part in this action which seeks to enforce their constitutional rights. Therefore, the petitioners now include only Meredith Freedman, mother of R.F. and Thomas Hennessy, father of L.H.

The petitioners in this case claim that the actions of the respondents resulted in a violation of due process and cruel and unusual punishment. Yet, the petitioners are not the individuals who suffered from the alleged constitutional violations. Therefore, they have no standing to assert constitutional violations and the Petition should be dismissed.

In order to have standing, the petitioners must allege an actual or threatened injury as a result of the conduct of the defendant, the alleged injury must be fairly traceable to the defendant's action that is challenged, and the injury alleged must be likely to be redressed by a favorable decision. *Family's Children's*

*Center, Inc. v. School City*, 13 F.3d 1052 (7th Cir. 1994); *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1984); *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985). The injuries which are alleged here are violations of the constitutional rights of R.F. and L.H. The only possible injury to petitioners is that they were unable to see their children graduate. Purely psychological harm will not satisfy the standing requirement. *Family & Children's Center*, 13 F.3d at 1058. Also, any loss the petitioners might claim cannot be given a monetary value. *See*, *Dangler v. Yorktown Cent. Schools*, 711 F.Supp. 625 (S.D.N.Y. 1991) (district court found father's damages where student was rejected from honor society had no monetary value). Furthermore, even if petitioners receive a favorable decision regarding this matter, that injury cannot be redressed because R.F. and L.H. can no longer participate in their own graduation exercises. Where the party seeking to invoke the authority of the federal courts cannot show an injury likely to be redressed, this Court has found that the claim is not justiciable. *Renne v. Geary*, 111 S.Ct. 2331, 2337 (1991); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

Since R.F. and L.H. are over eighteen (18) years old,[3] they have the legal ability to assert their own claims based on alleged violations of their constitutional rights. Simply because they have chosen not to participate in this action does not give their parents the legal ability to pursue the claim on their behalf. There is no legal basis to confer standing to the parents of R.F. and L.H. to assert such constitutional violations on behalf of R.F. and L.H. *See Powers v. Ohio*, 111 S.Ct. 1364, 1370, (1991). A litigant must assert his own legal rights and cannot rest his claim on the legal rights of third parties. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Barrows v. Jackson*, 346 U.S. 249 (1953). Where a student reached the age of majority pursuant to Kentucky law

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[3] R.F. and L.H. were seniors in high school two years ago in June, 1992. It is reasonable to assume each is over eighteen (18) years old now.

during an action against a board of education, the Sixth Circuit found that the parents of the student no longer had standing to sue in a representative capacity to enforce their son's rights. *Vandiver v. Hardin County Bd. of Ed.*, 925 F.2d 926 (6th Cir. 1991).[4] *See also Tyree v. Smith*, 289 F.Supp. 174 (E.D. Tenn. 1968). There is no reason for this Court to deviate from these sound principles and grant the parents' petition.

**B. The Case Is Moot**

Moreover, the petition is moot. Since R.F. and L.H. are now adults attending college, they can no longer participate in their own graduation exercises even if they were so entitled. Any references to this incident have been expunged from their high school records. Also, pursuant to the direction of the State Board, the prom regulations have been revised to specifically prohibit consuming alcohol while traveling to the Prom. *See*, PA-7a. Thus, no effectual relief can be provided to either petitioners or R.F. and L.H. Where effectual relief can no longer be afforded, the question should not be decided by a federal court. *Church of Scientology v. U.S.*, 113 S.Ct. 447, 449 (1992). *See also*, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 686, footnote.

Petitioners attempt to circumvent the mootness argument by stating that there will be more cases in the future in which students are prohibited from attending their graduation exercises. PB-14.[5] This assertion is purely speculative and is based solely on petitioners' opinions without any basis in fact. Petitioners' bold assertion does not create an injury that is actual or imminent. *See*, *Renne v. Geary*, 111 S.Ct. 2331, 2339 (1991). Indeed, if this Court were to rule on the constitutionality of the school regulations without an actual controversy, it would be issuing an advisory opinion. *See*, *Church of Scientology*, 113 S.Ct. at 450, n.6. Yet, this Court has no authority to give opinions

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[4] The age of majority in Kentucky is eighteen (18) years pursuant to Ky. Rev. Stat. §2.015. In New Jersey, the age of majority is also eighteen (18) years pursuant to N.J.S.A. 9:17B-3. Thus, the *Vandiver* case is directly applicable to this case.

[5] "PB" denotes Petitioners' brief.

upon moot questions or abstract propositions. *Mills v. Green*, 159 U.S. 651, 653 (1895). Nor does this Court sit to satisfy a scholarly interest or to benefit particular litigants. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1954).

Based on the above, the petitioners have no standing to assert constitutional claims on behalf of R.F. and L.H. Also, the case is moot. Therefore, the Petition should be denied.

## POINT II

### WHERE THE DECISION BELOW IS CONSISTENT WITH OTHER STATE AND FEDERAL COURT DECISIONS CONCERNING THE DUE PROCESS RIGHTS OF STUDENTS, THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THIS WRIT.

Contrary to the assertions of petitioners, the decisions below are not in conflict with other state or federal courts which have decided the same or similar issue. The jurisprudence concerning due process for students is well settled. It is unquestionable that students in a school setting are entitled to a certain amount of substantive and procedural due process. *See Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325 (1984); *Wood v. Strickland*, 420 U.S. 308 (1974); *Goss v. Lopez*, 419 U.S. 565 (1974).

The amount of procedural due process to which a student is entitled depends on the sanction. For suspensions greater than ten days, this Court has held that a student may be entitled to procedural due process which is more formal than mere notice of the charge, explanation of the evidence and an opportunity to present his/her story. *Goss*, 419 U.S. at 584. However, the aforementioned is all that is required for students facing suspensions which are ten days or less. This Court stated that "a two days suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution." *Bethel School District No. 403*, 478 U.S. at 686.

Here, R.F. and L.H. admitted to consuming alcohol while en route to the prom. They and their parents previously signed a document indicating they read and understood the district's policy and regulations on substance abuse. Furthermore, the principal spoke to all of those attending the prom about the rules regarding the prom and the sanctions for violating the rules. After R.F. and L.H. were advised that they would be prohibited from attending the prom, they were given a chance to be heard by the superintendent and board of education. An analysis of the relevant state and federal law indicates R.F. and L.H. were not denied due process in violation of the Fourteenth Amendment.

Petitioners must be able to point to a legitimate claim of entitlement before they can recover for a violation of due process. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Midnight Sessions, LTD. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991). In determining whether interests are to be protected by the Fourteenth Amendment a court must look to whether the interest is protected by state law and must weigh the importance to the holder of the right. *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983). The interests must be more than abstract desires or attractions to a benefit. *Board of Regents*, 408 U.S. at 577. While the right to a public education is protected by state law, there is no similar statutory entitlement to participation in graduation exercises. Since the interest claimed by petitioners is not protected by state law, and petitioners had no reasonable expectation of that interest once they violated the prom regulations, they were certainly not entitled to the formal due process from *Goss*.

Petitioners point to this Court's decision in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) in an attempt to show a conflict in jurisprudence concerning due process. That case, however, did not involve students being punished by school officials. It involved organizations which were designated Communist by the Attorney General of the United States. This was done without notice, without disclosure of the reasons and without an opportunity for the organizations to

establish their innocence. *Joint Anti-Fascist Committee*, 341 U.S. at 161 (Frankfurter, J., concurring).

The injury complained of in *Joint Anti-Fascist Committee* was a more serious injury when compared to the injury claimed by petitioners here, and yet, no due process was afforded to the petitioners in the *Joint Anti-Fascist Committee* case. Furthermore, the decision did not turn on a due process issue. Rather, the due process discussion appears in the concurring opinion. There, Justice Frankfurter states that the action taken against the involved organizations violated due process since the organizations were afforded no notice or hearing. Petitioners cannot claim that R.F. and L.H. did not receive notice of the charges against them or a hearing.

Several cases cited by petitioners, while involving a school setting, concern long term suspensions and expulsions. Where a number of high school students were suspended from an interscholastic program for one year, a federal district court found that the students were entitled to notice of the charges and an opportunity to defend against such charges. *Kelley v. Metropolitan County Bd. of Ed. of Nashville*, 293 F.Supp. 485, 492 (M.D. Tenn. 1968). The same due process was found to be required in cases concerning long term suspensions/expulsions from state supported colleges. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961); *Knight v. State Board of Education*, 200 F.Supp. 174, 178 (M.D. Tenn. 1961). These cases involve situations requiring formal due process as opposed to informal due process, due to the nature of the sanction. They do not address the situation where a student was merely prohibited from attending graduation exercises.

Petitioners also claim that the regulations relied upon by the respondents were not sufficiently defined and, therefore, R.F. and L.H. were not given adequate notice. PB-16. They argue further that the decision of the Superior Court of New Jersey, Appellate Division below conflicts with federal decisions which stand for the proposition that school regulations must sufficiently define prohibited conduct so as to give adequate notice to students.

The first case cited by petitioners is *Kolender v. Lawson* 461 U.S. 352 (1982). That case concerned a violation of criminal laws. Although the Court found there that the statute was unconstitutionally vague, the case is not applicable here as it concerned neither a student nor a school setting.

Similarly, in *Bystrom v. Fridley High Sch., Ind. Sch. Dist. 14*, 822 F.2d 747 (8th Cir. 1987), the court examined a school policy which allowed school administrators to review and approve an underground newspaper before it was distributed. The court, in *Bystrom* found that the policy was necessarily general because of the subjects involved. In addition, the court noted that the policy did not subject offenders to criminal sanctions and applied only to minors. The purpose of the policy was to assure that school hours and school property are devoted primarily to education. *Bystrom*, 822 F.2d at 750. Therefore, despite the general and subjective nature of the policy, the court found it was not constitutionally invalid. Obviously, this does not stand for the proposition that respondents' regulations were constitutionally infirm.

In *Anable*, *supra*, the court did not even address whether the school policy was vague and overly broad. Instead, the court found that the party asserting that claim had no standing in the suit. *Anable v. Ford*, 653 F.Supp. at 33-34.

The District Court in Arkansas found in *Claiborne v. Beebe School District*, 687 F.Supp. 1358 (E.D. Ark. 1988), that the school's regulation which prohibited the use of alcohol or drugs prior to coming on school grounds or to a school sponsored event was unconstitutionally vague. Notably, the court was not concerned that the school board did not have the authority to discipline students for conduct away from school premises. Rather, the court was concerned that the school regulation did not give adequate notice to the students because the regulation could be construed to prohibit conduct which occurred weeks prior to coming to school.

The court in *Claiborne* was, of course, examining a school regulation which was different from the policy and regulations

in this case. The regulations here have been found to provide sufficient notice to R.F. and L.H. by the Commissioner of Education in New Jersey, the New Jersey State Board of Education, the New Jersey Appellate Division and the New Jersey Supreme Court because they prohibit the use of illegal substances at all times, in all school buildings, on school property and at any activity sponsored by and under the supervision of school officials. In addition, they prohibit students from consuming alcohol at parties prior to the prom, from bringing alcohol to the prom site and from serving alcohol to any student or guest who attends the prom. The *Claiborne* case is also distinguishable because the sanction there was a semester-long academic suspension. Therefore, the *Claiborne* case does not conflict with the decisions below in this case either.

The above cases cited by petitioners concerning the specificity of school regulations merely indicate that such regulations must give adequate notice of what is prohibited and not offend the requirements of due process. *Bystrom*, 822 F.2d at 752 (quoting *Ginsberg v. New York*, 390 U.S. 629 (1968)); *Claiborne*, 687 F.Supp. at 1359. This Court has stated that school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. at 686 (1985). In light of the above, the decisions below are not in conflict with federal law.

Petitioners also point to several state decisions in an effort to support their argument that there is a conflict among courts concerning student discipline. Generally speaking, state decisions are not instructive because they rely upon state education laws which are not uniform from state to state. To the extent that they may implicate a conflict among courts concerning a federal question, we have addressed them.

In *Warren County Bd. of Educ. v. Wilkinson*, 500 So.2d 455 (1986), the court set aside the punishment imposed on a student for drinking a beer at home prior to going to school, because the school had no rule prohibiting such behavior. However, the *Warren County* case is inapposite here because the Park Ridge Board of Education promulgated rules prohibiting the concerned behavior.

The state appellate decision from Louisiana which is cited by petitioners does not conflict with the decisions below in this case either. The court in *Labrosse v. St. Bernard Parish School Board*, 483 So. 2d 1253 (La. App. 1986) found a violation of due process where the basis for a charge against a student was changed from one provision in a statute to another. There, the student was originally notified that he was being expelled for possession of marijuana pursuant to a section of a statute which prohibits such conduct on school grounds. When the facts revealed that the student was not on school grounds, the board attempted to argue for expulsion based on another section in the statute. Yet, it is apparent from petitioners' own statements that the basis for the students' punishment here did not change. From the beginning, the students admitted to consuming alcohol while traveling to the prom. Thus, they were well aware of the reason for their punishment. The most that can be said is that the notice concerning the students' infraction became more specific as time passed. Also, the *Labrosse* case concerned an expulsion, which is far more serious than the sanction at issue in this case.

In *Valentine v. Independent School District of Casey, et al.*, 191 Ia. 1100, 183 N.W. 434 (1921), the Iowa Supreme Court found that it was arbitrary and capricious for a board of education to deny diplomas to students who refused to wear gowns at the graduation exercises because the gowns smelled of formaldehyde. The court reached this conclusion because the students had performed all of the educational requirements for graduation. The rule concerning the wearing of caps and gowns had no relation "to educational values, the discipline of the school, scholastic grades, or intellectual advancement." *Valentine*, 191 Ia. at 1105, 183 N.W. at 436. Thus, the court did not pass on whether it would have been arbitrary and capricious for the board to prohibit the students from attending graduation exercises rather than prohibiting the students from graduating at all. In fact, the court went so far as to suggest that, "The board may deny the right of a graduate to participate in the public ceremony of graduation unless a cap and gown is worn." *Valentine*, 191 Ia. at 1105, 183 N.W. at 437. Moreover, this suggestion was made despite the fact that the board was unable to show that it had

formally adopted a rule regarding the wearing of caps and gowns in graduation exercises.

Petitioners contend that *Ladson v. Board of Ed., Union Free Sch. Dist. #9*, 323 N.Y.S. 2d 545 (Sup. Ct. 1971), supports their argument that preclusion of R.F. and L.H. from graduation was inappropriate. Indeed, the *Ladson* court found that a student who struck a principal with a stone should not be prevented from attending her graduation ceremonies. The decision was based in large part on the fact that there was no express authority in New York law to preclude a student from graduation exercises. Conversely, the Commissioner of Education in New Jersey has consistently found that preclusion from graduation exercises is an appropriate form of discipline. *K.L. v. Bd. of Ed. of Hopewell Valley Regional School District*, 1991 S.L.D. 1322; *P.G. v. Bd. of Ed. of Greater Egg Harbor Regional High School District*, 1989 S.L.D. ____ (Comm. Ed. July 18, 1989); *J.C. v. Long Branch Bd. of Ed.*, 1984 S.L.D. 1091; *Gertner v. Bd. of Ed. of Borough of Elmwood Park*, 1974 S.L.D. 611. Therefore, the reasoning in *Ladson* does not apply to this case.

In yet another case decided by the Iowa Supreme Court, a rule concerning the consumption of beer was found to be invalid. *Bunger v. Iowa High School Athletic Association*, 197 N.W.2d 555 (1972). The rule had been promulgated by the state association which governs interscholastic athletics. It provided that any athlete who admitted to consuming or possessing or transporting beer lost eligibility to participate in interscholastic athletics. The court found that the rule was invalid because the athletic association lacked the authority to promulgate such a rule. Also, the rule was interpreted by the school to require the punishment of a student who was only in a car in which he knew there was an untouched case of beer. The student had not actually done anything wrong, but was declared ineligible to play football based on the rule. Clearly, the *Bunger* case is distinguishable from the present case. The Park Ridge Board of Education has the authority to promulgate and enforce rules concerning consumption of alcohol by students. *See*, N.J.S.A. 18A:11-1. Also, R.F. and L.H. were punished for actually

consuming alcoholic beverages, as opposed to merely being in a car where alcohol was present.

The state court of appeals in Kentucky found the school administrators' actions to be arbitrary in *Clark County Bd. of Ed. v. Jones*, 625 S.W. 2d. 586 (Ky. App. 1981). There, the students were band members who consumed alcoholic beverages on a school-sponsored band trip. The relevant high school regulation makes suspension mandatory for a student's first offense concerning drugs or alcohol. That regulation also provides that the superintendent may recommend that offenders be expelled. The court in *Clark County* found that it was not clearly erroneous for the trial judge to conclude that school administrators should consider factors including the previous general conduct of students and the academic standing of students before expelling them.

The *Clark County* case addresses the situation where students are expelled from school, thus affecting a statutory right. Here, the students were not expelled, nor even suspended. They were simply prohibited from attending graduation. Nevertheless, the petitioners were given an opportunity to bring any factors they thought relevant to the board of education's attention at a board hearing. They have not produced any evidence that any of the factors enumerated in *Clark County* were not considered by respondents. Therefore, the *Clark County* case does not support petitioners' argument. It is, however, important to note that, the court approved the high school regulation which prohibits using alcoholic beverages while in transit to school functions. *See*, *Clark County*, 625 S.W. 2d at 589.

The last state case which petitioners cite in support of their contention that there is a conflict in the jurisprudence concerning this issue is *Betts v. Easley*, 169 P.2d 831 (1946). That case concerns a discrimination claim made by African-American railway workers against a labor organization. It has no bearing on the present situation.

Clearly, the cases cited by petitioners do not indicate a conflict among federal cases and/or state cases concerning student

discipline. They simply address different aspects of due process and/or student discipline which are clearly distinguishable from the facts of this case. The cases cited by petitioners are, to the contrary, consistent with the decisions below. Moreover, this Court has already spoken to a similar issue and has reached a conclusion consistent with the decisions below.

In *Board of Ed. of Rogers, Ark. v. McCluskey*, 458 U.S. 966 (1981), this Court considered a school policy which provided for a mandatory suspension of a student who used drugs on school premises, sold drugs on school premises or who had been under the influence on school premises. There, the involved student who left school to consume alcoholic beverages and then returned to school premises intoxicated, was suspended. The school rule was attacked because it specifically exempted alcoholic beverages from the definition of "drug". The Court reiterated what it had previously set forth in *Wood v. Strickland*, 420 U.S. 308 (1975). Specifically, the Court stated that federal courts are not authorized to construe school regulations. *Board of Ed. of Rogers, Ark.*, 458 U.S. at 969. Furthermore, this Court stated that the school board's interpretations of its own regulations control even where the federal court's interpretation is preferable. *Id.* at 971. Consequently, the school policy and the board's actions in *Board of Ed. of Rogers, Ark.* were upheld.

Likewise, the respondents' actions here should be upheld. They were based upon a school regulation which the board interpreted to prohibit the consumption of alcohol while travelling to the school-sponsored prom. Consequently, even if the respondents' interpretation was not preferable to the petitioners' under the circumstances, the respondents' interpretation should nonetheless prevail under the aforementioned case law. The parties' difference of opinion on the issue does not warrant the Court's intervention.

The above illustrates that the decisions below in this case do not conflict with any state or federal case-law. Moreover, there is no important question of federal law which has not been but should be settled by this Court. Therefore, there is no basis for review of this matter by this Court.

## POINT III

### THE PUNISHMENT IMPOSED ON THE STUDENTS HEREIN DOES NOT IMPLICATE THE EIGHTH AMENDMENT AND, THEREFORE, THE WRIT SHOULD BE DENIED.

Petitioners argue that the punishment imposed on R.F. and L.H. was illogical and cruel. PB-11. They suggest that the punishment violated the students' Eighth Amendment right against cruel and unusual punishment.

However, federal courts including this Court have previously ruled that the Eighth Amendment does not apply to the school setting. *See Ingraham v. Wright*, 430 U.S. 651, 671 (1977); *Ramon by Ramon v. Soto*, 916 F.2d 1377 (9th Cir. 1989); *Dickens by Dickens v. Johnson County Bd. of Educ.*, 661 F.Supp. 155 (E.D. Tenn. 1987). The reasoning behind this was that the original design of the Eighth Amendment was to circumscribe the criminal process. *Ingraham*, 430 U.S. at 667. Indeed, the Eighth Amendment was added to the Bill of Rights due to criticism that the Constitution failed to provide protection to persons convicted of crimes. *Ingraham* at 666.

In the past, this Court has had no difficulty finding the Eighth Amendment inapplicable to claims outside the criminal realm. *Id.* at 667-668. With regard to discipline imposed on school children, this Court has stated that "the prisoner and the school child stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Id.* at 669. Furthermore, the openness of public schools and civil and criminal liability are adequate safeguards for the proper education and discipline of the child. *Id.* at 670. This Court concluded, therefore, that students who were claiming that corporal punishment was in violation of the Eighth Amendment, could not prevail because that Amendment does not apply to school discipline. Moreover, this Court stated that the need for and the appropriate means of maintaining school discipline is committed generally to the discretion of school authorities subject to state

law. *Id.* at 682. If corporal punishment did not warrant the application of the Eighth Amendment, the denial of the privilege to attend graduation does not require the Court's intervention.

Nevertheless, the petitioners are correct in that the Supreme Court of Mississippi did, in dicta, bring the Eighth Amendment to the attention of a school board with regard to a student's punishment. Apparently, when the Supreme Court of Mississippi issued its ruling in *Warren County Bd. of Ed. v. Wilkinson*, 500 So. 2d 455 (1986), it was unaware of the *Ingraham* decision, since the *Ingraham* case is not cited therein.

In *Warren County*, the court found that discipline imposed upon a student who admitted to consuming alcohol at home prior to going to school appeared unreasonable compared to the sanctions for other offenses set forth in a student handbook. *Warren County*, 500 So.2d at 461. The school rule referred to in *Warren County* prohibited the use of alcoholic beverages while traveling to school. As a consequence of what the board of education interpreted to be a school violation, the student lost all credit for a semester of school work. The Supreme Court of Mississippi decided the case on due process grounds, finding the absence of a school rule which expressly or impliedly prohibited the complained of behavior and the student was not given a proper hearing.

Although the *Warren County* case fails to take into account the *Ingraham* decision, it is still distinguishable from the present case. Here, the students consumed alcohol while en route to their school prom after being warned specifically about drinking prior to their prom. They were not expelled or suspended, and they did not lose any course credit as the student did in *Warren County*. They were simply denied the privilege of attending graduation. In addition, the students were advised of the charges against them and they were given a hearing. Thus, there was no lack of due process.

Furthermore, as noted above, the prohibition from attending graduation is a form of student discipline that has repeatedly been approved by the Commissioner of Education of New Jersey. *K.L., supra; P.G., supra; J.C., supra; Gertner, supra.* Despite

petitioners' protestations concerning this type of punishment, the petitioners themselves admit it is an accepted punishment in New Jersey. PB-12.

The petitioners point out that students who violate football rules forfeit the right to play football and students who violate band rules forfeit the right to participate in the band. They conclude that it is unfair to have a rule which requires that students who violate prom rules forfeit their participation in more activities than the prom. However, the punishment for R.F. and L.H. was that they were prohibited from attending year-end senior activities. These activities included the prom and graduation exercises. Therefore, the discipline is actually very similar to that imposed on football players and band members. Since the prom is not an ongoing activity like football and band, and since student consumption of alcohol is of serious concern to school administrators, it was more than reasonable to prevent R.F. and L.H. from attending all of the year-end activities in addition to the prom. For this reason, the punishment was extended to other similar year-end senior activities.

Based on the above, there is no merit to petitioners' claim of a violation of the Eighth Amendment of the United States Constitution. As such, petitioners have presented no special and important reason that this Petition should be heard.

## POINT IV

## THIS COURT IS BOUND BY THE DECISIONS BELOW INSOFAR AS THEY CONSTRUE STATE LAW

The decisions below have construed New Jersey law as upholding respondents' decision to prohibit R.F. and L.H. from attending their graduation exercises because they admitted to consuming alcohol while traveling to their prom. Petitioners argue in Point III of their brief that respondents did not have authority based in state law to take the actions that they did. However, this Court may not substitute its judgment for that of the state courts below regarding the meaning of state law. "State law means what state courts say it means." *Bates v. McCaughtrey*, 934 F.2d 99, 102 (7th Cir. 1991).

Petitioners refer specifically to N.J.S.A. 18A:40A-11, N.J.S.A. 18A:37-2j, and N.J.A.C. 6:29-6.3(c)(2), noting that the Superior Court of New Jersey, Appellate Division erred when it interpreted these provisions to allow respondents to discipline R.F. and L.H. for consuming alcohol while traveling to the prom. Thus, the petitioners are requesting that this Court find that the interpretation of the above-noted state legislation by the state courts below is flawed. This Court has consistently noted its lack of jurisdiction to construe state legislation. *R.A.V. v. City of St. Paul, Minnesota*, 112 S.Ct. 2538, 2542 (1992); *Gooding v. Wilson*, 405 U.S. 518, 520 (1971); *United States v. Thirty Seven Photographs*, 402 U.S. 363, 369 (1970); *Nash v. State of Texas*, 632 F.Supp. 951 (E.D. Tex. 1986). Therefore, this Court must accept as binding the interpretations of state law which have been set forth in the decisions below. *R.A.V.*, 112 S.Ct. at 2542; *Tyree v. J.D. White*, 796 F.2d 390, 392 (11th Cir. 1986). Where litigants have requested that federal courts overturn a state's construction of a state statute, the federal courts have declined to do so. *Bates*, 934 F.2d at 103; *Tyree*, 796 F.2d at 392. Similarly, this Petition should be denied since this Court lacks the ability to substitute its judgment for that of the state courts below concerning the construction of N.J.S.A. 18A:40A-11, N.J.S.A. 18A:37-2j and N.J.A.C. 6:29-6.3(c)(2).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN R. FOGARTY
*Counsel of Record*

ELLEN MARIE WALSH
*On the Brief*

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*Attorneys for Respondents Board of Education of the Borough of Park Ridge, Bergen County, Neil Giovanniello, Louise Ruhle, George Apfel, Kathleen Coleman, George Gretsas, Gerald Hoffman, James Violante, Emil Binotto and Catherine Mozak*

Dated: August 5, 1994

# RESPONDENTS' APPENDIX

SB #29-92

| | | |
|---|---|---|
| R.F., individually and by her parents R. and M.F., R.F., AND M.F.; L.H., individually and by her parents T. and C.H., T.H. AND C.H., | : | |
| PETITIONERS-APPELLANTS, | : | STATE BOARD OF EDUCATION |
| V. | : | |
| BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY, NEIL GIOVANNIELLO, LOUISE RUHLE, GEORGE APFEL, KATHLEEN COLEMAN, GEORGE CRESTAS, GERALD HOFFMAN, JAMES VIOLANTE, EMIL BINOTTO, AND CATHERINE MOZAK, | : | DECISION ON MOTION |
| RESPONDENTS-RESPONDENTS. | : | |

Decided by the Commissioner of Education, June 18, 1992

For the Petitioners-Appellants, Meri Freedman and Thomas Hennessy, *pro se*

For the Respondents-Respondents, Fogarty & O'Hara (Stephen R. Fogarty, Esq., of Counsel)

Upon review of the papers submitted in this appeal, we find that the matter is moot, and we therefore dismiss the appeal. In so doing, we emphasize that the appeal before us is from a Commissioner's decision denying emergent relief and that our decision does not dispose on the merits of the underlying petition.[1]

November 4, 1992

Date of mailing NOV 5 1992

[1] We note that the parties have represented that the underlying petition is the subject of seperate [sic] proceedings and that the hearing in the matter was conducted before an Administrative Law Judge (ALJ) on October 2, 1992.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

June 7, 1994

Ms Meredith Freedman
8 Hall Court
Park Ridge, NJ 07656

Re: R.F. and L.H., et al. v. Board of Education of the Borough of Park Ridge, Bergen County, et al.

Dear Msr. Freedman:

Returned are 39 copies of a petition for a writ of certiorari postmarked May 17, 1994 and received in this office May 23, 1994 in the above-entitled case for failure to comply with this Court's Rules of Procedure.

It does not appear as though you nor Mr. Hennessy are members of the bar of this Court. Therefore, you may not represent the petitioners in this court. The Rules of this Court require that the name, address and telephone number of a member of the bar of this Court appear on the cover of the petition as counsel of record. Rule 33.2.

Corrected copies must be returned promptly in order for the case to be docketed. Rule 33.7.

Very truly yours,

William K. Suter, Clerk

By

(Mrs.) Loretta S. Ruffin
Assistant Clerk

Enclosures

cc: David E. Powers
Stephen R. Fogarty

8 Hall Court
Park Ridge, New Jersey 07656

June 27, 1994

William K. Suter
Office of the Clerk
Supreme Court of the United States
Washington, DC 20543

Re: Meredith Freedman and Thomas Hennessy et al., v. Board of Education of the Borough of Park Ridge, Bergen County, et al.

Dear Mr. Suter,

Enclosed please find 39 corrected copies of our petition for a Writ of Certiorari in the above-entitled case. As instructed by your office in a letter dated June 7, 1994, the petitions have been corrected in compliance with the Rules of the Court.

Thank you for your assistance in this matter.

Very truly yours,

/s/Meredith Freedman

Meredith Freedman
Pro Se on behalf of Petitioners

Enclosures

cc: David E. Powers
Stephen R. Fogarty

FOGARTY & HARA
COUNSELLORS AT LAW

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July 7, 1994

William K. Suter
Office of the Clerk
Supreme Court of the United States
Washington, DC 20543

Re: R.F. et al. v. Board of Education of the Borough of Park Ridge Docket No. A-005058-92T2

Dear Mr. Suter:

I am writing to confirm my conversation with the clerk's office this date regarding the above matter. I telephoned the clerk's office today to find out whether the Court had received the petitioners' corrected Petition for Certiorari. I was informed by Ruth Jones of the Clerk's office that the corrected Petition had been received, although she was not sure what date it was received. I informed Ms. Jones that this office did not receive copies of the corrected petition.

Pursuant to the advice of Ms. Jones, I contacted the petitioners to ask that a copy of the corrected petition be sent to this office. The petitioner, Meredith Freedman, stated to me that there were no extra copies to be sent to me.

Based on the above, I have been advised by Ruth Jones that my thirty (30) day time period to file my Brief in Opposition to a Petition for Certiorari begins to run today. Therefore, the brief will be filed on or before August 8, 1994.

If you should have any questions, of course, do not hesitate to contact us.

With kind regards, we are

Very truly yours,

FOGARTY & HARA

By: Ellen Marie Walsh
Ellen Marie Walsh

EMW:lr

cc: Mrs. Catherine Mozak
Superintendent of Schools
Ms. Lorraine Freedman
Mr. Thomas Hennessy